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fourteenth. Therefore those who would urge integration of the remaining lawfully segregated establishments would be well advised to do so by boycott, lawful picketing, or other means not involving the invasion of the segregated property. Otherwise, they run the risk of sustained convictions under clear, narrowly-drawn statutes.

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Constitutional Law—State Cannot Award Damages for Invasion of Privacy Without Proof of Actual Malice

The United States Supreme Court, in *New York Times Co. v. Sullivan*,[1] held that a state court could not constitutionally award damages in a libel suit by a public official against a critic of his official conduct without a showing of actual malice—that defendant knew the statement was false or that there was a reckless disregard for its truth. The malice requirement has since been extended to a prosecution under a state criminal libel statute.[2] In the recent case of *Time, Inc. v. Hill*,[3] the Court extended the malice requirement to a civil action for damages brought under a state invasion of privacy statute.[4]

In September of 1952 plaintiff Hill and his family were held hostage for nineteen hours in their home outside Philadelphia. The captors—three escaped convicts—then released the family unharmed. The following spring, a novel[5] was published describing "the experience of a family of four held hostage by three escaped convicts in the family's suburban home."[6] The family in the novel suffered violence and verbal abuse at the hands of the convicts, while the Hill family had not. When a play made from the book opened for

[1] 376 U.S. 254 (1964).

[2] Garrison v. Louisiana, 379 U.S. 64 (1964). *New York Times* and *Garrison* involved respectively a city commissioner and state criminal court judges—all clearly "public officials." In Rosenblatt v. Baer, 383 U.S. 75 (1966) the public official concept was extended to include a commissioner of a county ski recreation area.

[3] 385 U.S. 374 (1967).

[4] N.Y. CIVIL RIGHTS LAW §§ 50-51. Section 50 makes the use "for advertising purposes, or for the purposes of trade, the name, portrait or picture of any living person" without that person's consent, a misdemeanor. Section 51 gives any person whose name is so used, remedies in the form of actions for an injunction and for damages.

[5] HAYES, THE DESPERATE HOURS (1953).

[6] 385 U.S. at 378.

tryouts in Philadelphia, Life Magazine published a story captioned "True Crime Inspires Tense Play."[7] The text stated that the book and play had been "inspired by the [Hill] family's experience."[8] Plaintiff Hill brought an action for damages under the New York statute and, after two trials, an award of $30,000 compensatory damages[9] was affirmed by the New York Court of Appeals.[10] That court construed the statute as allowing a cause of action only for the fictionalized, or false, use of one's name for trade purposes.[11]

While refusing to condemn the statute as unconstitutional on its face, the Court, in an opinion by Mr. Justice Brennan, held that the first amendment protections of free speech and press prohibited application of the statute without proof of actual malice. Since under the trial court's instructions the jury could have found liability without finding that the false statements were made knowingly or recklessly, the case was remanded for a possible new trial.

Inception of the right of privacy is cited as the classic illustration of the forceful impact of scholarly comment upon the law.[12] Despite its relatively recent development,[13] the right is now said to have been recognized in thirty-four states and the District of Columbia.[14] It is distinguishable from defamation principally because

[7] Life, Feb. 28, 1955, p. 75.

[8] *Id.* at 75.

[9] At the initial jury trial plaintiff was awarded $50,000 compensatory and $25,000 punitive damages. A new trial was ordered as to damages only and, after waiver of a jury, plaintiff was awarded $30,000 compensatory damages by the court.

[10] Hill v. Hayes, 15 N.Y.2d 986, 260 N.Y.S.2d 7, 207 N.E.2d 604 (1965).

[11] The statute contains no such limitation on its face. N.Y. CIVIL RIGHTS LAW §§ 50-51. However, in an opinion handed down between the argument of *Hill* in the Supreme Court and the date of decision, the New York Court of Appeals made it clear that "factual reporting of newsworthy persons and events is in the public interest and is protected." Spahn v. Julian Messner, Inc., 18 N.Y.2d 324, 328, 274 N.Y.S.2d 877, 879, 221 N.E.2d 543, 545 (1966).

[12] Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960).

[13] Its beginnings are generally traced to a law review article published in 1890. Warren and Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). See generally, Kalven, *Privacy in Tort Law—Were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326 (1966); Prosser, *Privacy*, 48 CALIF. L. REV. 383 (1960); Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962).

[14] Of the thirty-five jurisdictions recognizing the right, thirty-one have done so by case law, while four have statutory provisions. PROSSER, TORTS 831-32 (3d ed. 1964).

Recently, Professor Kalven has questioned the substance of the right. He notes that "the lack of legal profile and the enormity of the counter-privilege [to serve the public interest in news] converge to raise for me the question of whether privacy is really a viable tort remedy. The mountain,

damage results from the infliction of mental distress, while in defamation, harm to reputation is the critical element.[15] Dean Prosser has subdivided the privacy tort into four categories: intrusion, disclosure, false light and appropriation.[16] *Hill* involved the third category, described as placing the plaintiff "in a false light in the public eye."[17]

Generally, though the press is privileged to report matters of "public interest," fictionalization of such matters has been held to nullify the privilege.[18] The Supreme Court in *Hill* establishes the proposition that although there is fictionalization, the "public interest" privilege is not defeated unless there was knowledge of the falsity or reckless disregard for the truth. The privilege formerly existing is not only expanded, but is raised to a constitutional level.

Mr. Justice Brennan, in the opinion of the Court, reasons that because of the vast range of matter published in the press the risk of public exposure has become inherent in our society, one "which places a primary value on freedom of speech and of press."[19] He argues that freedom of discussion must encompass all issues, and cannot be limited to areas of political expression. He points out that erroneous statements are no less likely in the area involved in *Hill* than in the context of official conduct, and that since the *New York Times* rule was fashioned because of the likelihood of error in that context, it should be applied here too. Mr. Justice Brennan insists that the result was not reached through a rote application of the *New York Times* principles, but only upon consideration of the factors that arise in the *Hill* factual setting.[20]

I suggest, has brought forth a pretty small mouse." Kalven, *Privacy in Tort Law—were Warren and Brandeis Wrong?*, 31 LAW & CONTEMP. PROB. 326, 337 (1966). However, for a provocative argument that the privacy action is destined to eventually swallow up defamation actions, see Wade, *Defamation and the Right of Privacy*, 15 VAND. L. REV. 1093 (1962).

A North Carolina case recognized the right where plaintiff's photograph was used in an advertisement under a false name and without her consent. But in the absence of proof of special damages only nominal damages were allowed. Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938). No subsequent North Carolina cases have been found on the point.

[15] Themo v. New England Newspaper Publishing Co., 306 Mass. 54, 57, 27 N.E.2d 753, 755 (1940).

[16] Intrusion consists of invading the plaintiff's physical solitude, disclosure is publicity of private information about the plaintiff and appropriation is the use of plaintiff's name or likeness for the defendant's benefit. PROSSER, TORTS 833-44 (3d ed. 1964).

[17] *Id.* at 837.

[18] See note 11 *supra* and accompanying text.

[19] 385 U.S. at 388.

[20] We find applicable here the standard of knowing or reckless false-

Whatever factors may have been present in *Hill,* the *political* setting upon which the Court relied in *New York Times* was absent. *New York Times* and two later cases in which the rationale was expanded[21] involved libel actions by governmental officials against critics of their official conduct. In each case the Court relied upon the factual backdrop of the political arena in applying a constitutional buffer protecting unintended falsity.[22] The principal case, in contrast, was a privacy action by a private individual. His conduct was in no way "official" nor was it in any sense political.

Plaintiffs in *New York Times, Garrison* and *Rosenblatt* had an opportunity to rebut the falsity that was not available to Hill because they were all public officials when the falsity was published and had considerable access to news media. Hill's cause of action arose when Life published its fictionalized report of the incident—two years after he had been involuntarily placed in the limelight. At that time, whatever accessibility to the press he might have had by virtue of the event was gone.

Mr. Justice Black, in an opinion in which Mr. Justice Douglas joined, concurred in the remand of the case but disagreed with the Court's constitutional principles.[23] His rationale[24] is by far the

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hood not through blind application of New York Times Co. v. Sullivan, relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals. This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discrete context.

Id. at 390-91.

[21] New York Times Co. v. Sullivan, 376 U.S. 254 (1964), involved a libel suit by an elected city commissioner against the publisher of an advertisement imputing false misconduct to law enforcement officials who worked under plaintiff's supervision. Garrison v. Louisiana, 379 U.S. 64 (1964), dealt with a criminal libel prosecution against a state district attorney who had criticized the official conduct of certain judges. Rosenblatt v. Baer, 383 U.S. 75 (1966), involved a libel suit by a supervisor of a county recreation area against the publisher of a newspaper column imputing misconduct to a small group of which plaintiff was a member.

[22] In all three the Court stated that it had considered the cases against a background of "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 383 U.S. at 85, 379 U.S. at 75, 376 U.S. at 270.

[23] 385 U.S. at 398-401. (Opinion of Black, J., concurring.)

[24] See *e.g.,* Rosenblatt v. Baer, 383 U.S. 75, 94 (1966) (Opinion of Black, J., concurring in part and dissenting in part); New York Times Co.

simplest of those presented in the decision. He begins with the premise, set out in his concurring opinion in *New York Times,* that at the minimum there must be an "unconditional right to say what one pleases about public affairs."[25] He feels the majority is wrong in balancing the competing values of free speech and the right to privacy because this gives to judges the power to choose between conflicting values when, in his view, that choice has already been made by the framers when they adopted the first amendment. Further, he feels that this portends future "balancing" by which other freedoms embodied in the Bill of Rights will be eroded away.

Mr. Justice Black's view appears subject to much of the same criticism as the Court's. However absolute the freedoms of press and speech may be, the political settings in *New York Times* and subsequent cases seem to have presented a much greater need for free speech than did *Hill.* The need for unhampered discussion of public officials' conduct is surely more vital than the need for news coverage of the opening of a play. Yet if one accepts Mr. Justice Black's principle that the first amendment freedoms are absolute, the above criticism is foreclosed. There can be no weighing of the competing values of free speech and the potential harm from speech because the framers of the constitution made that choice—in favor of free speech.

Mr. Justice Douglas, while concurring in Mr. Justice Black's opinion, adds two salient points in a separate opinion.[26] First, since the book and play revived the public interest created by the incident in *Hill,* news stories dealing with them were privileged. Fictionalization of those events—deemed to have given rise to the cause of action—is no more beyond the public interest privilege, in his view, than "a water color of the assassination of a public official"[27] would be. He feels that any right of privacy in this context is irrelevant. Second, the exception created by the majority for knowing or reckless falsity gives, he thinks, too broad a discretion to the jury and will prove to be no bar to a recovery when emotions are high and prejudices present.

Should the privilege to report events of public interest vanish when the reports are fictionalized? Mr. Justice Douglas seems to

v. Sullivan, 376 U.S. 254, 293 (1964) (Opinion of Black, J., concurring).

[25] 376 U.S. at 297.

[26] 385 U.S. at 401-02. (Opinion of Douglas, J., concurring.)

[27] *Id.* at 401.

argue that it should not in any event, in order that the creative process may have full protection of the first amendment. Still, it is also arguable that the privilege should be defeated when the fictionalization causes greater harm than a factual account would have caused.[28] The Hills, however, were depicted as undergoing more suffering and as displaying more courage than they did in fact. This may have created more public sympathy and admiration than otherwise would have been the case, but there is little likelihood—at least in the ordinary sense—that additional harm resulted. Thus, in the factual circumstances of *Hill,* whichever argument is accepted, the result for which Mr. Justice Douglas contends seems sound.

His second contention—that the malice requirement will be a small obstacle to emotional juries—appears equally sound. If a jury's whims are too uncertain to risk the use of a negligence standard, as Mr. Justice Brennan contended for the Court, a malice standard is likely to be just as uncertain. A jury emotionally drawn to one side of a case will in all probability decide in favor of that side whether the finding required is one of negligence or of malice.

Mr. Justice Harlan concurred in the remand of the case but dissented from the Court's application of the *New York Times* standard.[29] He feels that the Court's protection of unintentional falsehood in that case was based on two principles: the inevitability of error in dealing with abstract matters and the undesirability of the censorship that might arise if the elusive concept of "truth" were placed in the hands of juries. However, he argues, these principles do not negative a state's interest in encouraging thorough preparation and checking of material before publication. Further, he contends, because the *New York Times* political setting and the likelihood of competition of ideas on the matter at issue were absent in *Hill,* the state interest is much stronger here. Thus, he feels that a

[28] Thus, cases in which falsification has been held to have exceeded the public interest privilege have generally involved falsehood that, while not defamatory, was at least in some way derogatory. See *e.g.,* Leverton v. Curtis Publishing Co., 192 F.2d 974 (3d Cir. 1951) (Plaintiff was photographed lying injured after a pedestrian accident. The photo was used—twenty months later—in an article to illustrate "pedestrian carelessness" when in fact plaintiff had not been careless); Gill v. Curtis Publishing Co., 38 Cal. 2d 273, 239 P.2d 630 (1952) (A photo of plaintiffs (husband and wife) with arms around each other was used with a story about love. The photo depicted "love at first sight," described in the article as bad and leading to divorce, when in fact plaintiffs were happily married.)

[29] 385 U.S. at 402-411. (Opinion of Harlan, J., concurring in part and dissenting in part.)

more limited protective "breathing space" is required in the *Hill* situation, and that a state should be able to "hold the press to a duty of making a reasonable investigation of the underlying facts. . . ."[30]

In *New York Times,* application of the principles described above by Mr. Justice Harlan was plainly grounded on the peculiarly vital function that free discussion serves in the area of politics and government; and just as plainly, that political background was absent in *Hill.* Hence, there is much logic in Mr. Justice Harlan's argument that the facts in *Hill* call for a more limited immunization of falsity. His proposal that the negligence standard be adopted is also supported by his analogy to other professions upon which such a standard is imposed.[31] That standard is no more objectionable on the ground of uncertainty due to jury prejudice than is the present standard of malice.[32]

Speaking for the dissenters,[33] Mr. Justice Fortas seems to agree with the constitutional principles laid down by Mr. Justice Brennan —that a state may validly subject a party to liability for knowingly or recklessly publishing false matter about a private individual.[34] He feels, however, that the remand was possibly a guise used by the majority to camouflage a more permissive constitutional rule, and with that he disagrees.[35] Further, Mr. Justice Fortas argued that under the jury instructions (covering both punitive and compensatory damages) given by the trial court, knowing or reckless publication was found. In his view, the verdict could not have been rendered under the instruction on punitive damages without having been predicated on a finding of the requisite knowledge or reck-

[30] *Id.* at 409.

[31] Both the medical and the legal professions were cited as examples. *Id.* at 410 & n.7.

[32] A publication must have been made with "knowledge of its falsity or in reckless disregard of the truth" before a state may constitutionally condemn it by damage awards. *Id.* at 387-88.

[33] *Id.* at 411-20. (Opinion of Fortas, J., dissenting, in which Mr. Justice Clark and the Chief Justice join.)

[34] Mr. Justice Fortas also agrees with the Court's refusal to hold the New York statute unconstitutional on its face. *Id.* at 411.

[35] Perhaps the purpose of the decision here is to indicate that this Court will place insuperable obstacles in the way of recovery by persons who are injured by reckless and heedless assaults provided they are in print, and even though they are totally divorced from fact. If so, I should think that the Court would cast its decision in constitutional terms.
Id. at *Ibid.*

lessness.[86] Though the instructions were not letter perfect, he urged that they met the standard set out by the majority.

The members of the Court seem to fit into three basic groups on the constitutional issue in the principal case. Justices Black and Douglas adhere to the absolute view that a state should not be permitted, constitutionally, to award damages for the publication of any matter in the public interest, even including calculated falsity. Mr. Justice Harlan, at the other end of the spectrum, feels that a state should be able, constitutionally, to award damages to a private citizen for publication of false matter in the public interest if the publisher failed to use reasonable care in verifying its truth. The six other members of the Court, including the dissenters, contend that a state may constitutionally impose civil sanctions for *knowing or reckless publication* of false matter in the public interest where private individuals are involved. The majority view thus lies in a middle ground between the two extremes.

The majority has clearly made a policy determination that the right of free speech outweighs a private individual's "right of privacy" where there is no intentional falsity; but they reach Mr. Justice Black's result with Mr. Justice Harlan's rationale. Accordingly, the court's rationale might be more appropriately articulated in terms of the absolute right that free speech is coming to be. In any event, by extending the public interest privilege to a constitutional level, *Hill* seems likely to limit considerably the future usefulness of "privacy" as a tort.

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[86] The jury at the first trial was instructed that it might award exemplary damages only if they found that defendant

> falsely connected plaintiffs with The Desperate Hours and that this was done knowingly or through failure to make a reasonable investigation. . . . [Y]ou do not need to find that there was any actual ill will or personal malice toward the plaintiffs *if you find a reckless or wanton disregard of the plaintiffs' rights.*

Id. at 416. Although the majority seized upon the portion of the instruction that allowed the jury to make an award upon a finding of "failure to make a reasonable investigation," Mr. Justice Fortas felt that, taken as a whole, it met the *New York Times* standard.